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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, INC.,

Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court is reported at 53 Fed. Supp. 844 (R. 309-14).

The majority and dissenting opinions of the Circuit Court of Appeals are reported at 150 Fed. (2d) 694 (R. 322-328).

Jurisdiction

The decision of the Circuit Court of Appeals was rendered July 20, 1945. An order, upon stipulation of the parties, was made by the said Court staying the mandate until October 20, 1945, pending the filing of a petition for writ of certiorari.

Petition for writ of certiorari was filed October 17, 1945, and was granted November 19, 1945 (R. 340).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C., Section 347 (a); 8 F. C. A., Title 28, Section 347 (a).

Questions Presented

The questions presented are:

1. Whether the Fair Labor Standards Act of 1938 (29 U. S. C., Section 201 *et seq.**) prohibits a *bona fide* settlement of claims for overtime compensation and statutory liquidated damages under Sections 7 (a) and 16 (b) of the Act (29 U. S. C., Sections 207 (a), 216 (b)) where the settlement is made as the result of a *bona fide* dispute between an employer and its employees with respect to coverage under the Act and the employees are paid under the settlement all the overtime compensation to which they would have been entitled had they been within the protection of the Act.

2. Whether the employees may recover statutory liquidated damages and counsel fees under Section 16 (b) of the Act under a claim for non-payment of overtime under Section 7 (a) of the Act, where it is found in a suit for such damages and counsel fees instituted

* C. 676, 52 Stat. 1060, hereinafter referred to as the "Act."

after such *bona fide* settlement, that the employees were not entitled to all the overtime compensation claimed and received by them because during a substantial part of the period for which they made such claim they were not within the protection of the Act.

If the answers to the foregoing questions are in the affirmative, then

3. Whether building maintenance employees are within the protection of the Act if the facts relied on to establish coverage of the employees show only that some of the tenants in the building receive, work on and return in intrastate commerce goods belonging to local owners who are not tenants of the building and that subsequently some of the said goods are sold and shipped by such non-tenant owners in interstate commerce, there being no proof either that at the time of production such tenants had any knowledge of the ultimate destination of the goods worked on by them, or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of the completed goods in interstate commerce.

Statute Involved

Pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Section 201 *et seq.*) are set out in Appendix A annexed to this Brief.

The Facts

A. As to the Two Settlement Questions Presented: In June, 1942, shortly after this Court held in *Kirschbaum* v. *Walling*, 316 U. S. 517, that the Fair Labor Standards Act of 1938 applied to maintenance employees of buildings where concededly the tenants were engaged in pro-

ducing goods for interstate commerce, the respondents, who were maintenance employees at petitioner's twenty-three story loft building at 571-583 Eighth Avenue, New York City, demanded through their union representatives that petitioner pay them overtime compensation in accordance with Section 7 of the Act for all *time worked* by them from October 24, 1938, the effective date of the Act, to February 5, 1942, in excess of the hours prescribed in Section 7 (a) of the Act. At the same time respondents demanded that petitioner pay sums equal to such claimed overtime as liquidated damages under Section 16 (b) of the Act (R. 29, 39, 276). Petitioner denied liability on the ground that the tenants in its building were principally garment contractors who performed labor only for New York manufacturers and made no interstate sales or shipments of goods (R. 274-5). Respondents having threatened suit (R. 29, 276-7), the petitioner, in September, 1942, offered to compromise and settle the dispute by paying all the overtime compensation to which respondents would have been entitled had they been within the protection of the Act since October 24, 1938, but without the liquidated damages (R. 34, 278). After considering the offer and consulting with the local Wage and Hour Administrator's office and an official of their union (R. 25-6, 41) respondents accepted the offer (R. 34-37, 278). Petitioner thereupon made payment as agreed and received from each of the respondents his duly executed release of all further claims under the Act (R. 279-281).

Several months later respondent Gangi, who, as the union representative of all the respondents, negotiated the above settlement, instituted this suit solely for liquidated damages and counsel fees.

After trial without a jury the District Court found (R. 312):

> "* * * that there was a genuine dispute between the parties pertaining to a claim for compensation for a period long past; that the parties, negotiating

at arm's length, and without mistake, fraud or misrepresentation, on either part and without overreaching, reached an accord and an agreement for the settlement of their dispute; that the amount agreed upon was an amount equal to the overtime compensation that would be payable if the Act applied without liquidated damages, and that such amount was received by the plaintiffs in satisfaction of the claim; that to evidence that transaction the plaintiffs executed and delivered to the defendant releases under seal and that such accord and satisfaction and release should be given effect unless the statute forbids."

Holding that neither the Act nor the public policy underlying the Act prohibits such a *bona fide* settlement, the District Court accordingly sustained petitioner's defenses of accord and satisfaction and release, and dismissed the complaint (R. 314).

The Circuit Court of Appeals reversed (R. 322-6), Judge Chase dissenting (R. 327-8), and held (1) that the Act prohibits the *bona fide* settlement of a genuine dispute as to coverage under the Act, and (2) that the proof offered by respondents established that petitioner was liable under the Act for at least "a part of the period involved" (R. 325).

B. As to the Coverage Question Presented: The aforesaid second ground of reversal by the Circuit Court of Appeals raises the issue presented by the third question of the writ herein, namely, that of the sufficiency of proof to establish coverage. The proof on this issue was as follows:

Petitioner's building had 150,000 square feet of rentable space, which was occupied by more than ninety tenants during the period involved in the suit (Plaintiff's Exhibit 1, R. 329-332; Defendant's Exhibit F, R. 336B). These tenant-contractors worked on materials delivered to them which were owned by so-called garment manu-

facturers who had their offices, showrooms and shipping rooms elsewhere in New York City. After completing their services—sewing or stitching, pleating and trimming or fabricating accessories—the tenant-contractors returned the materials to the local manufacturers, who either had other contractors finish the goods into completed garments, or, if they were completed by the tenants, exhibited and sold them at wholesale, along with other garments worked on by other contractors who were not tenants of petitioner's building. A number of petitioner's tenants worked for several such local manufacturers, while practically all of the manufacturers had several other contractors, not tenants of the building, working on their goods.

Thus, the only relationship of the tenants in petitioner's building to the manufacturers who owned the materials and sold the completed garments was that of true independent contractors, who performed specific production operations in the manufacture of garments from the manufacturers' materials. Proof was made upon the trial that ultimately some of the garments worked on by the tenant-contractors were sold and shipped by the owner-manufacturers in interstate commerce.

The District Court stated that "by a generous appraisal of the testimony," in 1939 7.7% of the space in the building was occupied by eight tenants engaged in the production of goods for interstate commerce; in 1940, 8.2% of the space was occupied by such tenants; and in 1941, 10.3% of the space was occupied by such tenants (R. 314, footnote 1). Upon the consent of both parties the Circuit Court of Appeals treated these facts as findings of the District Court (R. 326).

In November, 1943, the Administrator of the Act adopted a standard of 20% of space occupancy for determining whether a substantial portion of a building is devoted to production of goods for interstate commerce, for

the purpose of bringing building maintenance employees within the Act (Wage and Hour Division Release No. PR-19 [rev.], November 19, 1943). The Circuit Court of Appeals accepted that standard in the case at bar (R. 325-6). Upon the figures as found by the District Court, the respondents were not under coverage of the Act at any time within the period in suit.

In the Circuit Court of Appeals respondents urged, however, that the District Court erred in excluding from its computations for 1940, 1941 and January, 1942,—twenty-five months of the thirty-nine months involved in the suit—the percentages of space occupied by an additional twelv tenants, who were claimed by respondents also to have been engaged in the production of goods for interstate commerce.* The Circuit Court of Appeals held that "the testimony clearly shows that at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other states" (R. 326). Adding the percentages of space occupied by these tenants to the District Court's percentages, the Circuit Court concluded that the total percentage of space occupied by interstate producers in petitioner's building in 1940, 1941, and January, 1942, was in excess of 20% of the total area in the building and "therefore appellants have shown that they were covered by the Act" (R. 326). The sole basis in the record for this finding is that the manufacturers for whom the said twelve tenant-contractors worked eventually disposed of some of their goods in interstate commerce. No evidence was

* These twelve tenants were Levy-Blum & Goldschmidt Corp. (R. 64-76); Ansonia Frocks (R. 88-93); Abraham Kaufman (R. 100-107); Raizen & Trager (R. 167-8); Vincent Gamberdini (R. 169-176); Schrader & Bazarnick (R. 176-177); Maurice Steindl (R. 178-188); Benjamin Weinstein (R. 130-132); Max Yuni (R. 133-136); Max Schneider (R. 107-108); Samuel Sunshine (R. 81-88) and Columbia Belt Co. (R. 108-123 and R. 155-158). All the foregoing are referred to herein as contractors, although the first mentioned actually was a manufacturer, with offices, salesroom and shipping rooms elsewhere in New York City.

offered and no attempt was made to prove that at the time when any of the additional twelve tenants worked on goods belonging to the manufacturers, such manufacturers had an order or an agreement or contract for the shipment of the goods, when completed, in interstate commerce. There was no testimony by any of the twelve tenants that they knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. In fact, there was no evidence, in the case of four of the twelve tenants, that any of them knew, either at the time of production or at any time thereafter, or even upon the trial, that the goods worked on by them were eventually shipped in interstate commerce. These four tenants were Max Schneider (R. 107-8); Benjamin Weinstein (R. 130-2), Raizen & Trager (R. 166-8) and Schrader & Bazarnick (R. 176-7). If the Court below erred in including these four tenants as being interstate producers under the Act, then respondents have no claim against petitioner even if the Act forbids the *bona fide* settlement of a *bona fide* dispute, and even if the Court was correct in finding the other eight tenants to be interstate producers. This appears from the following:

These four tenants occupied 10,500 sq. ft. of the entire 150,000 sq. ft. of rentable area in the building. The aggregate percentage of the total space occupied by these four tenants during the years 1940, 1941 and January 1942, was 7% (as computed from Defendant's Exhibit F, R. 336B). If the said 7% is excluded from the Circuit Court's computation, there would be no coverage for 1940, because the total percentage of space in petitioner's building occupied by interstate producers would be less than 20%. If there was no coverage for 1940, the amount paid on the settlement as overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942,—is found to be slightly in excess of twice the overtime due for the whole of 1941 and January, 1942. Thus, even if it be assumed that during 1941 and January,

1942, the respondents were within the Act, and that the *bona fide* settlement is invalid, petitioner would not be liable in any event under Section 16 (b) of the Act (Schedule A to the complaint, R. 6, as modified by stipulation, R. 16-18).

Because of the key position occupied by these four tenants, we briefly summarize their testimony in Appendix B, pages 27-8 of this Brief.

No attempt was made by respondents to prove that the manufacturers ever advised the tenants that the goods were to be shipped outside New York. There was no attempt to prove that any of the tenants were put on notice that the goods worked on by them during the period involved in the suit would be shipped outside New York. The only conceivable basis upon which the Court could have made its finding that the additional twelve tenants "had at the very least reasonable grounds to anticipate that their products would move in other states" was upon the theory that, since petitioner's building was located in what the Court below describes as "the garment district of New York City," the tenants were on notice that the goods worked on in petitioner's building would be shipped in interstate commerce. But there was no proof offered that the garment industry in New York City was of such an interstate character that specific proof concerning the activities of individual tenants in petitioner's building was unnecessary in order to fix liability upon petitioner under the Act.

Specification of Errors

The Circuit Court of Appeals erred as follows:

(1) On the first two questions:

(A) In holding that an action may be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages after such employee has

been paid upon the *bona fide* settlement of a *bona fide* dispute between him and his employer as to coverage under the Act, all the overtime compensation claimed and to which he would have been entitled had he been within the protection of the Act during the entire period for which he claimed such compensation.

(B) In holding that such an action may be maintained solely for the recovery of liquidated damages under Section 16 (b) of the Act after such employee has been paid upon such settlement of such *bona fide* dispute an amount more than he would have been entitled to had he been within the protection of the Act during the entire period for which he claimed overtime compensation but less than the full amount of such overtime compensation plus the liquidated damages.

(C) In holding that an employee and an employer may not settle and compromise a *bona fide* dispute between them as to coverage under the Act where upon such settlement the employee is paid by the employer all the overtime compensation which the employee claims to be entitled to under the Act and in consideration thereof the employee releases the employer from all further claims under the Act, including the claim for liquidated damages under Section 16(b) of the Act.

(D) In holding that the release of all further claims under the Act, executed and delivered by the employee to his employer at the time he received all of the overtime compensation claimed by him under the Act upon the *bona fide* settlement of the *bona fide* dispute with his employer as to coverage under the Act, is not a good defense to an action subsequently brought by such employee solely to recover liquidated damages, under Section 16(b) of the Act.

(E) In failing to give effect to the well-established policy of the law to encourage the amicable adjustment of disputes by arm's length negotiation where the statutory purposes have been fully accomplished.

(2) On the third question—

(A) In holding that building maintenance employees were within the protection of the Act where it is shown only that the tenants of the building received, worked on and returned in intrastate commerce goods belonging to local owners who were not tenants of the building and that subsequently some of the said goods were sold and shipped by such non-tenant owners in interstate commerce, there being no proof that at the time of production such tenants of the building had any knowledge of the ultimate destination of the goods worked on by them or that at the time of production the non-tenant owners had any prior orders or agreements to sell and ship any part of such goods in interstate commerce.

(B) In holding that under the circumstances recited in the foregoing paragraph the tenants of the building knew or had reasonable grounds to anticipate that such goods worked on by them would move into other States and that, therefore, they were engaged in the production of the goods for interstate commerce within the meaning of the Act.

SUMMARY OF ARGUMENT

The holding of the Circuit Court of Appeals that the public policy underlying the Act forbids the compromise and settlement of a *bona fide* dispute as to coverage rests upon a misapprehension of this Court's decision in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, 324 U. S. 697. The interests of employers, employees and the pub-

lic require adherence to the rule established in cases under other federal statutes dealing with the employer-employee relationship, that a *bona fide* settlement should not be invalidated if the employer shows that the dispute leading to the settlement was *bona fide* and that the settlement was arrived at freely and without fraud or coercion and that at the time of the settlement the employee was fully apprised of his rights. (Point I.)

Respondents did not sustain their burden of establishing petitioner's liability under Section 7(a) of the Act, the proof having failed to establish that tenants occupying 20% or more of the space in petitioner's building were interstate producers within the meaning of the Act. (Point II.)

ARGUMENT

POINT I

Neither by its text nor by its underlying policy does the Act prohibit the compromise and settlement of a *bona fide* dispute between an employer and an employee as to the employer's liability under Section 7(a) of the Act.

In *Brooklyn Savings Bank* v. *O'Neil*, *supra*, this Court held that, in the absence of a *bona fide* dispute between an employer and an employee as to liability under Section 7 (a) of the Act, an employee's release of his right to liquidated damages under Section 16 (b) was invalid and does not bar a subsequent action to recover such liquidated damages. The ground of this Court's holding in that case was that such a release was "a mere waiver, no different from a waiver by an employee of his right to the basic statutory minimum wage or overtime wages payable under the Act" and that to allow such a waiver would nullify the purposes of the Act.

In *Dize* v. *Maddrix*, 324 U. S. 697 (a companion case of *Brooklyn Savings Bank* v. *O'Neil*, *supra*), this Court held absolutely void a release and waiver of liquidated damages under Section 16 (b) of the Act given by an employee to an employer when both parties knew at the time the combined waiver and release was given that more than the amount paid to the employee was due him as minimum statutory wages under the Act. The ground of the decision in the *Dize* case was that "the employer and employee attempted by means of that release to waive the right to the basic statutory minimum wages as well as the right to liquidated damages" and that such a waiver would nullify the purposes of the Act.

In its decision in the foregoing cases this Court, however, expressly reserved determination of the question of the validity of an agreement between an employer and an employee "to settle claims arising under the Act if the settlement is made as the result of a *bona fide* dispute between the two parties, in consideration of a *bona fide* compromise and settlement. Neither of the above mentioned cases presented such issues for our consideration." (324 U. S. 714.)

The case at bar presents the issue thus reserved by this Court. The District Court held in this case that neither the Act nor the policy underlying the Act forbids such a *bona fide* settlement. The Circuit Court of Appeals, Judge Chase dissenting, reversed the District Court and held that the Act forbids the *bona fide* settlement of a dispute between an employer and an employee where the dispute is as to the basic liability of the employer under Section 7 of the Act even though in the dispute between the parties the Circuit Court found that each of them was partly right and partly wrong as to the employer's basic liability (R. 326).

The opinion of the Circuit Court of Appeals proceeds upon four erroneous assumptions. These are:

First: That the facts in this case are "exactly the same as those" in *Brooklyn Savings Bank* v. *O'Neil*, *supra*. (R. 325.) This is not so as the following quotation from this Court's opinion in that case shows (324 U. S. 703):

> "We think the record in this case shows that the release was not given in settlement of a *bona fide* dispute between employer and employee. * * * With the exception of the recital in the release, there is nothing in the record which shows that the respondent's release was obtained as the result of the settlement of a *bona fide* dispute between the parties with respect to coverage or amount."

Second: Despite this Court's repeated reference to the fact that the questions in *Brooklyn Savings Bank* v. *O'Neil* and *Dize* v. *Maddrix*, *supra*, did not involve "a *bona fide* dispute between the parties as to coverage or amount", the Circuit Court erroneously assumed that the question reserved by this Court in the *O'Neil* case was confined to a "genuine dispute, not as to the law of the Act, but as to facts, such as the amount of labor actually performed" (R. 325). This erroneous assumption gave rise to the Circuit Court's misapprehension that this Court had passed upon the point in issue in this case (R. 325).

Third: The Circuit Court's third erroneous assumption is that the liability under Sec. 7 of the Act and the liquidated damages under Sec. 16 (b) of the Act constitute "a single and entire liability" which under no circumstances may be compromised. In *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, this Court held that the liquidated damages to which an employee is entitled under Section 16 (b) of the Act constitute compensation for de-

lay of payment of sums due under the Act. While this Court held in that case that the liability for such liquidated damages was mandatory regardless of the good faith of an employer or the reasonableness of his belief that no overtime compensation was owed by him to his employees, it did not hold that *therefore* a *bona fide* dispute between the parties as to whether overtime compensation was payable under the Act could not be compromised and settled. The statement from its prior decision in *Rigopolous* v. *Kervan*, 140 Fed. (2d) 506, 507, quoted by the Circuit Court of Appeals in its opinion herein, that the employer's liability for unpaid overtime compensation and liquidated damages under Section 16 (b) "is a single and entire liability" which is "not discharged in toto by paying one-half of it" is correct only as it applies to cases such as *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where there has been no *bona fide* dispute as to liability or to cases where the parties—employer and employee—enter into an agreement to circumvent the provisions of Sections 6 or 7 of the Act.

Such language clearly does not apply to a case where the liability under the Act is, in good faith, the point in issue.

When the dispute arose between the parties in the case at bar, the respondents asserted two claims, one for overtime compensation under Section 7 of the Act and the other for an equal amount as liquidated damages under Section 16 (b) of the Act (R. 29, 39, 276). The dispute involved the basic liability for either of said amounts. As the litigation in the case at bar has established, the dispute was so well-founded that the two courts below have disagreed as to the correct answer to the question of basic liability. Even the Circuit Court has sustained in substantial part (for the 14 months prior to Jan. 1, 1940) petitioner's denial of liability. Under such circum-

stances the payment of the amount claimed as overtime compensation was sufficient consideration for the release of the claim for the liquidated damages.

Chicago, Milwaukee & St. Paul R. Co. v. *Clark*, 178 U. S. 353;
Bofinger v. *Tuyes*, 120 U. S. 198;
Schuttinger v. *Woodruff*, 259 N. Y. 212;
Jaffray v. *Davis*, 124 N. Y. 164;
Schnell v. *Perlmon*, 238 N. Y. 362;
Nassoiy v. *Tomlinson*, 148 N. Y. 326.

Fourth: The final assumption made by the Circuit Court of Appeals is that to approve a *bona fide* settlement of a *bona fide* dispute, such as is presented by this case, would make it possible for employers to evade the Act. This assumption overlooks the fact that when an employer pleads a release in a case under a federal statute enacted for the benefit of employees, the employer has the burden of proving that the release was supported by adequate consideration; was procured as a result of arm's-length negotiation free from coercion and deception and that the employee was fully apprised of his rights. All of these conditions were met and have been found in the case at bar (R. 312-3).

Even a seaman who traditionally has been deemed a "ward of the admiralty" may release his claims under the statutes enacted for his protection (Seaman Act, 46 U. S. C., Sections 597, 644; Jones Act, 46 U. S. C., Section 688) if such release is "executed freely without deception or coercion and * * * was made by the seaman with full understanding of his rights." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. The Court below, in *The S. S. Standard*, 103 Fed. (2d) 437 (C. C. A. 2), itself had occasion to apply this rule in a case where the issue presented was as to the binding force of a general release executed by an injured seaman of all claims which he

had or might have against his employer. The District Court had held that the seaman could not give away or release his right to maintenance and cure. However, the Circuit Court of Appeals held that (103 Fed. (2) 439) "a release fairly entered into and fairly safeguarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty."

It may fairly be said that in the case at bar as in the above case, it "would be no kindness" to the employee to forbid absolutely all *bona fide* settlements under the Act because had respondents been given no alternative to litigation they might not have recovered what petitioner voluntarily paid them on the settlement. That such is not a remote possibility is suggested by the fact that the computation of the settlement in the case at bar was based upon a substantially longer period of time—thirty-nine months—than the Circuit Court of Appeals fixed as the period of petitioner's liability—twenty-five months.

Notwithstanding a provision in the Federal Employers' Liability Act (45 U. S. C., Section 55) prohibiting waivers of liability created under the Act, settlements of accrued claims under the Act have been upheld in this Court, *Mellon* v. *Goodyear*, 277 U. S. 335, *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53, and in the State courts, *Griffin* v. *N. Y., N. H. & H. R. Co.*, 279 Mass. 511, *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okl. 155; *Ballenger* v. *Southern R. Co.*, 106 S. C. 200; *Lindsay* v. *Acme Cement Plaster Co.*, 220 Mich. 367.

The decisive consideration in interpreting the foregoing statutes has been the protection of the employee, *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, and as indicated by the foregoing cases, the employees are completely protected by the shifting of the burden of

proof where the employer sets up a release or a settlement agreement as a defense to the employee's action. Such burden was fully discharged by petitioner in the instant case.*

Under the holding of the Circuit Court of Appeals in this case an employer must, no matter how well-founded his claim may be that he is not or was not subject to the provisions of the Act, either concede his past or present liability under the Act and pay the full amount of the compensation claimed by his employees, plus an additional sum as liquidated damages, or stand upon his denial of liability and force his employees to institute suit to a final judicial determination of the disputed question of liability. In many borderline cases such a course would obviously result in a disruption of amicable employer-employee relationships, and compel employees to risk more by suit than they might procure in settlement and compel litigiousness where the general policy of the law is to encourage adjustment.

By the holding below, thousands of settlements of disputed liability under the Act which have been heretofore made between employers and employees involving tens

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* The dissenting opinion below states (R. 327-8):

"Here there was no overreaching by anybody and if ever parties to a real dispute as to liability may finally settle their differences on the basis of a fair compromise duly carried out as agreed that was done in this case. As the district judge well said in his opinion, 'The plaintiffs had the option of bringing suit and taking the risk of recovering nothing or avoiding that risk by the acceptance of a compromise proposal.' It seems to me that enlightened public policy ought to permit employees, competently advised as to their rights, to have and to exercise such an option whenever they have the desire and opportunity to do so in cases where the controversy as to liability is based on substantial grounds. I cannot believe, until and unless authoritatively so advised, that they must be restricted to an 'all or nothing' gamble."

of millions of dollars have been put in peril and are subject to being reopened by further demands and suits.*

Furthermore, it would appear under the holding below that at no intermediate stage of litigation as to liability under the Act may the suit be settled by payment of less than the sums claimed by the employees, including the liquidated damages and counsel fees.†

Such a sharp departure from the generally accepted interpretation of similar federal statutes should only be made when the Congressional intent is clear and unequivocal. As this Court recently said in another but somewhat similar situation,

> "If Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329.

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* In his annual report for the fiscal year ended June 30, 1944, the Administrator of the Act states that in the five years and nine months that the Act had then been in force, about $[illegible] in restitution of illegally withheld wages had been agreed to or ordered paid to about 2,[illegible] workers in and about [illegible] establishments and that "several times this amount has probably been collected in addition over the period, through private actions or negotiation by employees and their unions under a section of the Act which provides double penalty for failure to pay the minimum wage or time and a half for overtime after 40 hours a week" (emphasis ours). (Fair Labor Standards Act, Martin's 3rd year, Annual Report, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, for the Fiscal Year Ended June 30, 1944, p. 20.)

† Such settlements are not unusual. *Cf. North Shore Corporation, Petitioner* v. *Barnett et al.*, *id.* v. *Scott et al.*, 323 U. S. 679, where this Court at its last Term, approved, *per curiam*, stipulations of settlement in two cases pending before it after certiorari had been granted where the only questions presented dealt with basic liability coverage under the Act. The stipulations so approved by this Court provided that the employees should accept [illegible]% of the amounts of the judgments recovered by them below for minimum wages and overtime compensation found to be due them under Secs. 6 and 7 of the Act together with an equal amount as liquidated damages under Sec. 16(b) of the Act. *Overstreet et al.* v. *North Shore Corp.*; *Scott et al.* v. *id.*, 52 Fed. Supp. 503 (D. C. S. D. Florida), affd., *North Shore Corp.* v. *Barnett et al.*, 143 Fed. (2) 172, 595 (C. C. A. 5th).

POINT II

Assuming, without conceding, that the settlement and releases are invalid, petitioner nevertheless is not liable because respondents failed to establish coverage under the Act.

The burden of establishing petitioner's liability under the Act rested upon respondents. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 90.

To establish coverage it was incumbent upon respondents, building maintenance employees, to prove that tenants occupying more than 20% of the space in the building intended or expected "at the time of production" that the goods worked on by them would move in interstate commerce. This 20% standard for building maintenance employees was established by the Wage and Hour Administrator (Wage and Hour Division Release No. PR-19 [rev.] Nov. 19, 1943) and upon the argument of the appeal below was accepted by both parties herein. Such standard was adopted by the Circuit Court in its opinion in this case (R. 325).

In *United States* v. *Darby*, 312 U. S. 100, 118, this Court construed the phrase "production for commerce" used in Section 7 of the Act as meaning "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."*

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* In its opinion in *United States* v. *Darby*, *supra*, this Court referred to the opinion of the Wage and Hour Administrator as to the coverage provisions of the Act in his Interpretative Bulletin No. 5 (1940 Wage and Hour Manual, pp. 131 *et seq.*, Wage and Hour

Upon the proof offered by respondents, the District Court found that at no time during the period in suit was more than 10.3% of the space in the building occupied by tenants producing goods for interstate commerce (R. 314, footnote 1). This percentage was less than the said 20% standard of occupancy.

The Circuit Court held, however, that the space occupied by twelve additional tenants in petitioner's building should be added to the District Court's computations because "at the time of production these tenants had at the very least reasonable grounds to anticipate that their products would move in other States" (R. 326). Adding the percentage of space occupied by the twelve additional tenants to the District Court's percentages, the Circuit Court found coverage for the last twenty-five months of the thirty-nine months' period involved in suit and it found no coverage for the first fourteen months of the period in suit (R. 326).

Division Release R.—113; Dec., 1938, Revised Nov., 1939). Paragraph 2 of the said Bulletin reads as follows:

> "Employers are engaged in the production of goods 'for commerce' where the employer intends or hopes or has reason to believe that the goods or any unsegregated part of them will move in interstate commerce. *If, however, the employer does not intend or hope or have any reason to believe that the goods in production will move in interstate commerce, the fact that the goods ultimately do move in interstate commerce would not bring employees engaged in the production of these goods within the purview of the Act. The facts at the time that the goods are being produced determine whether an employee is engaged in the production of goods for commerce and not any subsequent act of his employer or of some third party.* Of course, the fact that the goods do move in interstate commerce is strong evidence that the employer intended, hoped or had reason to believe that the goods would move in interstate commerce." (Italics ours.)

Although, as this Court stated in *Skidmore* v. *Swift*, 323 U. S. 134, the rulings, interpretations and opinions of the Administrator are not controlling on the courts, nevertheless they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

The issue, therefore, as to coverage comes down to whether or not the additional twelve tenants were properly found to be interstate producers within the meaning of the Act. The sole basis in the record for the finding by the Circuit Court that these additional twelve tenants had "at the very least reasonable grounds to anticipate that their products would move in other States" was that some of the goods worked on by these tenants were, as it turned out, eventually disposed of in interstate commerce by the owner-manufacturers thereof. As has been shown in our discussion of the facts relating to coverage (pp. 7-9, *supra*), no evidence was offered and no attempt was made to prove that, at the times when any of the additional twelve tenants worked on the goods belonging to the manufacturers, such manufacturers had an order or contract for the shipment of the goods when completed in interstate commerce (*cf. Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569). There was no proof that any of the twelve tenants knew or had reason to believe that the goods worked on by them would be shipped in interstate commerce. The respondents made no attempt to prove that the manufacturers ever had advised the tenants that the goods were to be shipped to points outside of New York State and there was no attempt to prove that any of the tenants had been put on notice that the goods worked on by them were to be shipped outside of New York State.

Therefore, under the foregoing tests of coverage, the respondents were not within the Act.

In point of fact, as is shown in Appendix B, pages 27 s. *infra*, there was no proof in the case of four of the twelve tenants that any of them knew, *even at the time of the trial*, that any of the goods worked on by them had been shipped in interstate commerce, even though under the foregoing tests of coverage such subsequent development would have been irrelevant.

As has been stated at pp. 8-9, *supra*, if the space occupied by the said four tenants—7% —is excluded from the Circuit Court's computation, there would be no coverage for 1940 because the total percentage of space in petitioner's building then occupied by interstate producers would be less than the 20% standard. And if there was no coverage for 1940 and the *bona fide* settlement is held to be invalid, petitioner still would not be liable under Section 16 (b) of the Act, because the amount paid on the settlement as straight overtime compensation for the entire period in suit—October 24, 1938, to February 5, 1942,—is slightly in excess of the overtime due for 1941 and January, 1942 plus an equal amount as liquidated damages under Section 16(b). (Schedule A to complaint, R. 6, as modified by Stipulation, R. 16, 18).

The Circuit Court finding that the additional twelve tenants had "at the very least reasonable grounds to anticipate that their products would move in other States" must have been based upon the theory that, since petitioner's building was located in what it describes as "the garment district of New York City" (R. 325), the interstate character of the garment industry of New York City was established and that, therefore, the tenants were on notice that goods they worked on would be shipped in interstate commerce.

This theory finds no support either on the face of the Act or in the decisions of this Court or in the interpretation placed upon the Act by the Wage and Hour Administrator.

The Act itself does not provide for an industrial classification of industries as the test of coverage.

In *Kirschbaum* v. *Walling*, 316 U. S. 517, and *10 East Fortieth Street Building* v. *Callus*, 325 U. S. 578, this Court held that the question as to whether or not building maintenance employees are within the Act depends in each case upon the question whether or not their activities are within the area of commerce in which Congress

saw fit to regulate when it enacted the Act. Therefore, Section 3 (j) of the Act, which defines employees within the coverage of the Act to be those who are engaged "in any process or occupation necessary to the production of goods" for commerce, requires "an inquiry into the relationship of the particular employees to the production of goods for commerce" (*Kirschbaum* v. *Walling*, 316 U. S. 517, 525).

In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572, this Court stated:

> "The applicability of the Act is dependent upon the character of the employees' work. * * * Here as in other situations the question of the Act's coverage depends on the special facts pertaining to the particular business."

In the Annual Report of the Wage and Hour Division for the Fiscal Year Ended June 30, 1944, the Administrator of the Act, after pointing out (pp. 8-9) that "coverage under the Act is not itself as broad as the Federal power," with the result that "employees protected by the Act and others unprotected may work side by side at similar tasks in the same plant," suggests that the problem thus presented could be met by changing the test of coverage "to an industry basis making the minimum wage and maximum hour provisions applicable to all employment in industries found by the Administrator substantially to affect interstate commerce."

However, as the Administrator points out, this is a question for Congress and not for the courts to decide.

Conclusion

The decision below is erroneous and should be reversed.

Respectfully submitted,

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Appendix A

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §201 et seq.) read as follows:

Sec. 3(j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compen-

sation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Appendix B

Max Schneider (R. 107-8) — Mr. Schneider occupied 1,900 square feet on the sixteenth floor of petitioner's building during the entire period in suit (R. 107, 336B). He was a dress contractor and contracted exclusively for C. H. D. Robbins Company of 525 Seventh Avenue, New York City, a manufacturer. The following is the only testimony bearing on his knowledge of the eventual disposition of the goods worked on by him:

> "Q. Do you know where the dresses were shipped from C. H. D. Robbins Company?
>
> "A. From C. H. D. Robbins Company?
>
> "Q. Yes.
>
> "A. I do not."

Benjamin Weinstein (R. 130-2) — This tenant occupied 3,378 square feet of the eighth floor of petitioner's building during the entire period in suit (R. 336B). His business and activities were testified to solely by Frieda Cohen, a forelady in his establishment. She testified merely that

Mr. Weinstein was a contractor working exclusively for M. Gollomp & Sons of 501 Seventh Avenue, who had other contractors (R. 132).

Raizen & Trager (R. 167-8).—This firm occupied 2,427 square feet of the twenty-third floor of petitioner's building throughout the entire period in suit (R. 336B). The only witness concerning this tenant was Emil Raizen, a member of the firm, who testified that during the said period he did contracting for Herman Byspill of 570 Seventh Avenue, New York City. He testified merely that he never saw the original orders received by the manufacturer for the dresses made by his firm (R. 168) and that all the goods his firm worked on were supplied by the manufacturer.

Schrader & Razarnick (R. 176-7).—This tenant occupied 2,800 square feet on the eighteenth floor of petitioner's building throughout the period in suit (R. 336B). The sole testimony concerning this tenant was given by Miss Florence Cahman, an employee of the tenant. She testified only that the tenant was a contractor for Sheila Lynn, a manufacturer, of 1400 Broadway, New York City, and that the tenant "gets everything sent in from the manufacturer" (R. 177).